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CHARLES ELMORE

Nos. 65, 104, 105, and 323

In the Supreme Court of the United States

OCTOBER TERM, 1930

PERCIVAL E. MAGEE, PETITIONER

v.

THE UNITED STATES

OAK WORSTED MILLS, PETITIONER

v.

THE UNITED STATES

TAFT WOOLEN COMPANY, PETITIONER

v.

THE UNITED STATES

SECOND NATIONAL BANK OF SAGINAW, SAGINAW, MICHIGAN, TRUSTEE OF THE ESTATE OF WELLINGTON R. BURT, DECEASED, PETITIONER

v.

THE UNITED STATES

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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No. 323

SECOND NATIONAL BANK OF SAGINAW, SAGINAW, Michigan, trustee of the estate of Wellington R. Burt, deceased, petitioner

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THE UNITED STATES

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS

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OPINIONS BELOW

The opinion of the Court of Claims in the *Magee case* (R. 12–18) is reported in 37 F. (2d) 763. The

opinions in the *Oak Worsted Mills case* (R. 32–44, 45–54) are reported in 36 F. (2d) 529, and 38 F. (2d) 699. The opinion in the *Taft Woolen case* (R. 23) is reported in 38 F. (2d) 704. The opinion in the *Second National Bank case* (R. 13–14) is reported in 40 F. (2d) 129.

JURISDICTION

Magee case, No. 65

The judgment of the Court of Claims was rendered January 20, 1930. (R. 10, 18.) The petition for certiorari was filed March 25, 1930. (R. 19.) Certiorari was granted May 19, 1930 (R. 21), 281 U. S. 713.

Oak Worsted Mills case, No. 104

The judgment of the Court of Claims was rendered December 2, 1929. (R. 44.) A motion for a new trial was denied on February 17, 1930. (R. 44–52.) The petition for certiorari was filed May 7, 1930. (R. 55.) Certiorari was granted June 2, 1930 (R. 57), 281 U. S. 717.

Taft Woolen Co. case, No. 105

The judgment of the Court of Claims was rendered March 3, 1930. (R. 23.) The petition for certiorari was filed May 7, 1930. (R. 23.) Certiorari was granted June 2, 1930 (R. 25), 281 U. S. 717.

Second National Bank case, No. 323

The judgment of the Court of Claims was rendered April 30, 1930. (R. 14.) The petition for certiorari was filed July 29, 1930. (R. 14.) Certiorari was granted October 20, 1930. (R. 15.)

The jurisdiction of this Court in all of the cases is conferred by Section 3(b) of the Act of February 13, 1925.

QUESTION PRESENTED

The general question involved in the *Magee case* and the other cases in this group is:

Where a tax is assessed within time and prior to June 2, 1924 (the effective date of the Revenue Act of 1924), but a claim in abatement is filed and collection is deferred until after the statutory time therefor has expired, does Section 611 of the Revenue Act of 1928 bar recovery of the tax so paid?

STATUTES INVOLVED

The statutes involved will be found in the Appendix, *infra* pp. 17–18.

STATEMENT

In the *Magee case* the petitioner filed his income-tax return for 1916 in February, 1917, and paid the tax shown thereon. The Commissioner of Internal Revenue later audited the return and assessed an additional tax of $6,911.30. Thereafter the Commissioner made another examination, as a result of which the additional assessment was increased to $64,982.12. (R. 10.) This amount was assessed in October, 1921, within the five years therefor as provided in Section 250 (d) of the Revenue Act of 1921. (R. 10.) After notice and demand for payment by the Collector, the petitioner filed a claim in abatement of the assessment, which was forwarded by the Collector to the Commissioner and by the Commissioner considered. (R. 10.) The Collector, in

accordance with the usual custom in such cases, delayed proceedings for the collection of the additional assessment and made no further endeavor to collect the amount covered by the claim in abatement until after the claim had been finally adjusted by the Commissioner of Internal Revenue. (R. 10–11.)

On April 19, 1923, the Commissioner advised petitioner of his proposed action on the claim for abatement, which was to abate the assessment except for $46,021.71. (R. 10.) The petitioner protested against the proposed action, and after further consideration by the Committee on Appeals and Review on August 9, 1923, the action of the Commissioner was sustained. On February 12, 1924, the Commissioner allowed the claim in abatement in the amount of $21,952.28 and rejected it in the amount of $43,029.84. (R. 11.) On May 13, 1924, the Collector made demand for payment of this amount. Payment was made in three installments in May and June, 1924, and July, 1925. (R. 11.) A claim for refund was filed by the petitioner on December 12, 1927, on the ground that the collection was out of time. (R. 11.) The claim was rejected and suit was instituted December 12, 1928. (R. 5.) The Government defended on the ground that Section 611 of the Revenue Act of 1928 barred recovery. The Court dismissed the petition.

In the *Oak Worsted, Taft Woolen,* and *Second National Bank cases* the material facts are as follows:

Oak Worsted Mills case, No. 104

Return filed June 16, 1919. (R. 29.)

Assessment made March, 1924. (R. 30.)

Claim in abatement filed April 12, 1924. (R. 30.)

Five-year period for collection expired June 16, 1924 (five years from filing of return).

Claim in abatement acted upon February 11, 1925. (R. 30.)

Collection made September 10, 1925. (R. 31.)

Suit brought April 4, 1928. (R. 7.)

Revenue Act of 1928 enacted May 29, 1928.

Taft Woolen case, No. 105

Return filed June 14, 1919. (R. 17.)

Assessment made March, 1924. (R. 18, 19.)

Claim in abatement filed between March 25, 1924, and April 18, 1924. (R. 19.)

Five-year period for collection expired June 14, 1924.

Claim in abatement acted upon November 25, 1924. (R. 19.)

Collection made June 1, 1925. (R. 20.)

Suit brought February 21, 1928. (R. 8.)

Second National Bank case, No. 323

Return filed April 1, 1918. (R. 11.)

Assessment made January, 1921. (R. 12.)

Claim in abatement filed February 17, 1921. (R. 12.)

Five-year period for collection expired April 1, 1923.

Claim in abatement acted upon May 24, 1923. (R. 12.)

Collection made October 12, 1923. (R. 12.)
Suit brought February 4, 1929. (R. 6.)

SUMMARY OF ARGUMENT

Section 611 of the Revenue Act of 1928 should be construed to bar recovery of the taxes herein sought to be recovered. The suits being against the United States in the Court of Claims, recovery may be had only in accordance with the Acts of Congress. As Section 611 was enacted prior to suit in two of the cases and before trial in the other two, the Court of Claims properly applied the section. Section 611 has not been repealed and its enactment was constitutional.

ARGUMENT

The facts in these four cases are similar and present the same questions of law. The discussion hereafter is directed to the *Magee case*. Wherever the facts in any of the other cases differ from the facts in the *Magee case*, the difference will be noted. The respondent submits the four cases under this one brief.

I

SECTION 611 OF THE REVENUE ACT OF 1928 SHOULD BE CONSTRUED TO PREVENT RECOVERY OF TAXES COLLECTED AFTER THE STATUTORY TIME THEREFOR HAD EXPIRED, IF CLAIM IN ABATEMENT WAS FILED AND THE COLLECTION STAYED

At the time the tax in the *Magee case* was collected the period for collection had expired, and the petitioner, having made timely claim for refund, which was rejected, was entitled to recover the amount so

collected. The record does not disclose the date of the rejection of the claim for refund, but suit was instituted December 12, 1928. Prior to the institution of the suit the Revenue Act of 1928 was enacted on May 29, 1928.[1] This Act contains Section 611 (p. 18, *infra*), which the respondent contends effectually bars recovery of the tax. The writ of certiorari in the present case was limited to a review of the question of the validity and effect of Section 611 of the Revenue Act of 1928. The questions of the construction and constitutionality of Section 611 are fully discussed in the respondent's brief in *Graham and Foster* v. *Goodcell*, No. 36, October Term, 1930. The same general questions are presented in that case as in the *Magee case*. There are three distinctions between that case and the instant one, namely: (1) In that case the suit was against the Collector; here it is against the United States. (2) In that case the claim in abatement was rejected before collection was barred; in this case the action on the claim in abatement was delayed until the period for collection had expired. (3) In that case the suit was instituted prior to the enactment of the Revenue Act of 1928 and during the life of Section 1106 (a) of the Revenue Act of 1926; in this case it was instituted after the enactment of the Revenue Act of 1928, which repealed Section 1106 (a) of the Revenue Act of 1926.[2] These distinctions,

[1] In the *Oak Worsted* and *Taft Woolen cases* suit was instituted April 4, 1928, and February 21, 1928, respectively.

[2] *Oak Worsted* and *Taft Woolen cases* were brought before the Revenue Act of 1928 was enacted.

if material, are in favor of the respondent in the instant case.

(1) Whatever may be said of the personal nature of the suit against a Collector to recover taxes erroneously collected by him, a suit against the United States in the Court of Claims to recover such payments is wholly subject to the will of Congress. That court is not a constitutional court and its jurisdiction and life are dependent upon Congress. *Ex parte Bakelite Corporation*, 279 U. S. 438.

(2) In the *Graham and Foster case* it is argued by the taxpayer that the claim in abatement was disposed of at a time when the collection period had not expired and that this fact should remove the case from the operation of Section 611 of the Revenue Act of 1928. That situation is not present in the instant case. The five-year period for collection in this case expired in February, 1922, and there was no action on the claim in abatement, which was filed in November, 1921, until April, 1923. The Collector during all that time was deferring collection pending the determination of the claim in abatement. (R. 10.)[3] The five-year period expired while the collection was deferred awaiting the determination of the claim in abatement.

(3) In the *Graham and Foster case*, it is also urged on behalf of the taxpayer that the institution of suit before the 1928 Act was enacted vested in the tax-

[3] The same is true in the *Second National Bank case*. (R. 13.) In the *Oak Worsted* and *Taft Woolen cases* there is no such finding.

payer the right to recover and prevented Section 611 of the Revenue Act of 1928 from affecting the case. That point can not be urged here.[4]

The decision of this Court in the *Graham and Foster case* will be decisive of this case unless the decision there is in favor of the taxpayer because of one of the three points mentioned above which are not in the instant case.

II

THE TAX COLLECTED IN THIS CASE WAS TIMELY ASSESSED AND A CLAIM IN ABATEMENT WAS FILED

The petitioners' briefs here filed make a number of contentions all of which, except three, are raised in the briefs filed on behalf of the petitioners in the *Graham and Foster case*, No. 36, present term, and are discussed in the respondent's brief in that case and are not repeated here.

The three contentions not so discussed are: (1) The tax was not assessed within the period of limitations; (2) the claim in abatement was illegal; (3) Section 611 has been repealed by a later Act.

The third of these contentions is discussed *infra*, pp. 10–15. We submit that the first two of these contentions do not fall within the scope of the limited review granted in this case. (R. 21.)

Moreover, they are not tenable. While the first relates to a matter which was set forth in the petition for the writ in this case, it involves a construction of Section 9 (a) of the Revenue Act of 1916 and Sec-

[4] Suit was instituted in the *Oak Worsted* and *Taft Woolen cases* prior to enactment of the Revenue Act of 1928.

tion 250 (d) of the Revenue Act of 1921 (*infra*, p. 17). Section 250 (d) by clear terms is made applicable to the assessment of tax for the year in question.

As to the second contention, petitioner's brief does not set forth any reason why the claim in abatement was not legal but rests this contention upon a quotation from Section 250 (d) of the Revenue Act of 1921. (Petitioner's Brief, p. 17.) If answer is needed to this, it is that as the taxpayer secured the object desired by the claim in abatement, namely, delay in collection, it should not now be heard to question the legality of the means which it employed. Cf. *Florsheim Bros. Co.* v. *United States*, 280 U. S. 453, 464; *United States* v. *John Barth Co.*, 279 U. S. 370, 376. The assessment was made within the five-year period prescribed by Section 250 (d) of the Revenue Act of 1921 and the legality of the claim in abatement can not be questioned.

III

SECTION 611 WAS NOT REPEALED BY THE ACT OF MAY 29, 1928, C. 901, SEC. 3, 45 STAT. 986, 996

Section 3220 of the Revised Statutes, as amended by the Revenue Act of 1918, was as follows:

> The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy

> collector the full amount of such sums of money as may be recovered against him in any court, for any internal taxes collected by him, with the cost and expenses of suit; also all damages and costs recovered against any assessor, assistant assessor, collector, deputy collector, agent, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty, and shall make report to Congress at the beginning of each regular session of Congress of all transactions under this section. [Sec. 1316(a) Revenue Act of 1918, c. 18, 40 Stat. 1057, 1145.]

This section was reenacted by Section 1315 of the Revenue Act of 1921 (c. 136, 42 Stat. 227, 314) and again by Section 1011 of the Revenue Act of 1924 (c. 234, 43 Stat. 253, 342), both times without change. Section 1111 of the Revenue Act of 1926 (c. 27, 44 Stat. 9, 115) amended the section by inserting a clause at the beginning of the section so as to make it read:

> Except as otherwise provided in sections 284 and 319 of the Revenue Act of 1926 the Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized, * * *.

Section 284 of the Revenue Act of 1926 placed certain limitations on the granting of credits and refunds in cases of income, war-profits, and excess-profits taxes, all made necessary because of the finality of the decisions in such cases after appeal to the Board of Tax Appeals. Section 319 of the

Revenue Act of 1926 contained similar limitations in the case of estate taxes.

The Revenue Act of 1928, which contains Section 611, here involved, also amended Section 3220 of the Revised Statues, as follows:

> SECTION 619. (b) Section 3220 of the Revised Statutes, as amended by section 1111 of the Revenue Act of 1926, is amended by striking out "Except as otherwise provided in sections 284 and 319 of the Revenue Act of 1926" and inserting in lieu thereof "Except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes." (C. 852, 45 Stat. 791, 878.)

The Revenue Act of 1928 contained provisions similar to Sections 284 and 319 of the Revenue Act of 1926, all in some way limiting the Commissioner in his broad power to refund taxes. We are contending in this group of cases that Section 611 was likewise a limitation on the authority given the Commissioner by Section 3220.

On May 29, 1928, the President approved the Revenue Act of 1928 and also an Act entitled "An Act To discontinue certain reports now required by law to be made to Congress." Section 3 of this Act (c. 901, 45 Stat. 986, 996) is as follows:

> SEC. 3. Section 3220, Revised Statutes (title 26, section 149, page 737, United States Code), as amended, is amended to read as follows:
>
> "REFUNDMENTS; TAXES AND PENALTIES.—The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary

> of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal-revenue taxes collected by him, with the cost and expense of suit; also all damages and cost recovered against any assessor, assistant assessor, collector, deputy collector, agent, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty, and shall make report to Congress, *by internal-revenue districts and alphabetically arranged of all refunds in excess of $500*, at the beginning of each regular session of Congress of all transactions under this section. (Italics ours.)

The taxpayers contend that the Act containing the section just quoted was enacted after the Revenue Act of 1928. We maintain that it does not appear that this is so, and that even if the section just quoted were enacted after the Revenue Act of 1928 it does not operate to repeal Section 611 of the Revenue Act.

The Revenue Act of 1928 was approved by the President at 8 A. M. on May 29, 1928 (45 Stat. 791, 883). It is the custom to indicate the hour of approval of Tariff and Revenue Acts, but we are informed that no record is kept of the time of the signature of

other Acts. The Statutes at Large do not show at what hour of the day the Act upon which the taxpayers rely was approved by the President. As there is nothing in the record showing the hour of approval, we submit that the Act to Discontinue Reports can not be said to be later than the Revenue Act of 1928. Cf. *Lapeyre* v. *United States*, 17 Wall. 191, 198; *Burgess* v. *Salmon*, 97 U. S. 381, 383. Furthermore all Acts passed at the same session of the legislature should be construed together as one enactment. Sutherland, Statutory Construction (2d. ed.), Section 268. As so construed, there is no difficulty in reconciling the two acts here in question.

The addition made to Section 3220 by the Revenue Act of 1928 and that made by the Act to Discontinue Reports are quite consistent and were both in force as parts of Section 3220 at the end of the first session of the Seventieth Congress.

Even if it were established that the Act to Discontinue Reports was approved later than the Revenue Act of 1928, and that the two provisions were irreconcilable, it would merely have the effect of amending Section 3220 so as to strike out the exception clause. A repeal of Section 611 by this would not necessarily follow. The addition to Section 3220 which was made by the Act to Discontinue Reports was as to the manner and form of the reports of the Commissioner of Internal Revenue to Congress of refunds allowed pursuant to Section 3220 of the Revised Statutes. (Italicized *supra*.) This case, we submit, forcibly shows the reason for the

frequently quoted statement that repeals by implication are not favored. Here, Congress, in dealing directly with the authority of the Commissioner to refund taxes, has prescribed certain limitations. In another Act enacted at nearly the same time, Congress, in dealing with routine reports, has prescribed the forms in which certain reports of activities should be made. It is not to be presumed that by this Act Congress did more than what it purported to do throughout that Act, that is, eliminate certain reports and prescribe forms which other reports should take. This is expressly stated to be the purpose of the Act in its preamble.

Repeals by implication are not favored and usually occur only where there is such an irreconcilable conflict between an earlier and a later statute that effect reasonably can not be given to both. *United States* v. *Healey*, 160 U. S. 136, 146; *United States* v. *Greathouse*, 166 U. S. 601. And where, as here, there is a special provision (Section 611 of the Revenue Act of 1928) and a general provision (the amended Section 3220) the presumption is, in the absence of an express repeal, or an absolute incompatibility, that the special provision is intended to remain in force as an exception to the general provision. *Townsend* v. *Little*, 109 U. S. 504, 512; *Rodgers* v. *United States*, 185 U. S. 83, 87–89. In the present case both statutes, Section 611 and Section 3220 R. S., as amended, can be given reasonable operation if this presumption is recognized. *Washington* v. *Miller*, 235 U. S. 422, 428.

CONCLUSION

The judgments should be affirmed.

Respectfully submitted.

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DECEMBER, 1930.

APPENDIX

The Revenue Act of 1921, c. 136, 42 Stat. 227, 265, provides in part as follows:

> SEC. 250 (d). The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, or under section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act: * * *.

The Revenue Act of 1928, c. 852, 45 Stat. 791, 874, 875 (U. S. C. Sup. III, Title 26, Secs. 2607, 2611, 2612) provides in part as follows:

SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES.

Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim.

* * * * *

SEC. 611. COLLECTION STAYED BY CLAIM IN ABATEMENT.

If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection.

SEC. 612. REPEAL OF SECTION 1106(a) OF 1926 ACT.

Section 1106 (a) of the Revenue Act of 1926 is repealed as of February 26, 1926.

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